Supreme Court, U.S.
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No. 00-_____

In the Supreme Court of the United States

MAGDY ELAMIR, ET AL.

PETITIONERS,

V.

MAGNET RESOURCES, INC.,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW JERSEY SUPERIOR
COURT-APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

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82 pp

QUESTION PRESENTED

Whether the addition of defendants to an existing judgment as judgment-debtors without the opportunity for a hearing on the merits of the plaintiff's claim that gave rise to the original judgment violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as interpreted by this Court in the recent decision of *Nelson v. Adams USA, Inc.*, 120 S. Ct. 1579 (2000).

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed are all contained in the caption to that case. The petitioners in this case are Magdy Elamir, M.D., Kennedy MRI, Inc., Jersey City Neurological Center, Inc., and Paterson MRI, P.A. The respondent is Magnet Resources, Inc.

RULE 29.6 STATEMENT

Petitioners Kennedy MRI, Inc., Jersey City Neurological Center, Inc., and Paterson MRI, P.A. are entities each wholly-owned by Magdy Elamir, M.D. Petitioner Magdy Elamir is an individual.

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In the Supreme Court of the United States

MAGDY ELAMIR, ET AL.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Magdy Elamir, M.D., Kennedy MRI, Inc., Jersey City Neurological Center, Inc., and Paterson MRI, P.A. (collectively, the "Post-Judgment Defendants") hereby petition this Court to issue a writ of certiorari to review the judgment of the New Jersey Superior Court-Appellate Division in this case.

OPINIONS BELOW

The decision of the New Jersey Supreme Court denying the Post-Judgment Defendants' petition for a writ of certification and dismissing their appeal as of right (Petitioner's Appendix ("Pet. App.") at 1a.) is reported at *Magnet Resources, Inc. v. Elamir*, 762 A.2d 218 (N.J. 2000). The opinion of the New Jersey Superior Court-Appellate Division affirming the trial court's amended judgment adding the Post-Judgment

Defendants as judgment-debtors (Pet. App. at 2a-13a.) is unreported. The opinions, written and oral, of the New Jersey Superior Court–Law Division amending its prior judgment to add the Post-Judgment Defendants as judgment-debtors (Pet. App. at 17a-33a.) are also unreported. The decision of the New Jersey Superior Court–Appellate Division affirming the trial court's original judgment against Summit MRI, Inc. ("Summit") (Pet. App. at 34a-60a.) is reported at *Magnet Resources, Inc. v. Summit MRI, Inc.*, 723 A.2d 976 (N.J. Super. Ct. App. Div. 1998).

GROUNDS FOR JURISDICTION

The opinion of the New Jersey Superior Court–Appellate Division affirming the trial court's amended judgment adding the Post-Judgment Defendants as judgment-debtors was entered on June 20, 2000. (Pet. App. at 2a-13a.) The order of the New Jersey Supreme Court denying the Post-Judgment Defendants' petition for a writ of certification and dismissing their appeal as of right from the Appellate Division's judgment was entered on October 11, 2000. (Pet. App. at 1a.) No petition for rehearing was filed. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

This case concerns the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides in relevant part as follows:

> No State shall . . . deprive any person of life, liberty, or property without due process of law . . . .

U.S. Const., amend. XIV, § 1.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND.

Magnet Resources, Inc. ("Magnet") provided maintenance services to two urban New Jersey magnetic resonance imaging ("MRI") clinics under a service contract with Summit, which is wholly owned by Dr. Magdy Elamir. In February 1995, Magnet filed suit against Summit, Dr. Elamir, Kennedy MRI, Inc. ("Kennedy"), and Mohamed Hanafy,[1] alleging that Summit had materially breached the service contract and that Dr. Elamir and Mr. Hanafy had fraudulently induced Magnet to continue servicing the clinics' machines by falsely promising payment. The complaint also sought *quantum meruit* damages against Kennedy, another MRI clinic owned by Dr. Elamir and occasionally serviced by Magnet. Summit answered Magnet's complaint and counter-sued in the name of "Summit MRI, Inc., now known as Irvington MRI, Inc.," claiming that Magnet had itself breached the service contract by providing inadequate services thereunder.

II. PROCEEDINGS IN THE COURTS BELOW.

Following discovery on the various claims, the trial court granted motions for summary judgment by Dr. Elamir and Mr. Hanafy on the fraudulent inducement claims and dismissed them from the case. The Appellate Division ultimately affirmed these dismissals. *Magnet Resources*, 723 A.2d at 987. Magnet's claim against Kennedy was settled separately before trial.

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1 Mr. Hanafy was an accountant in private practice who provided accounting services to Dr. Elamir and his companies.

The remainder of the case between Summit and Magnet was tried to a jury in June of 1997. The jury returned a nearly half-million dollar verdict in favor of Magnet for Summit's breach of the service contract, and awarded Summit $18,000 in damages on its counterclaim. Both parties cross-appealed. The Appellate Division affirmed the judgment for Magnet, but reversed the judgment in favor of Summit on its counterclaim. *Magnet Resources*, 723 A.2d at 987.

During the pendency of that appeal, Magnet obtained leave of the trial judge to conduct supplemental discovery regarding the finances of Summit and other companies owned by Dr. Elamir. Based (purportedly) on its supplemental discovery, Magnet moved the trial court in March of 1999 for leave to reopen the judgment against Summit so that Magnet could ***file an amended complaint*** alleging additional claims against Dr. Elamir, Mr. Hanafy, Kennedy, Jersey City Neurological Center, Inc. ("JCNC"), and Paterson MRI, P.A. ("Paterson").

In June of 1999, a three-day hearing was held before the trial court on the sole issue whether the Post-Judgment Defendants had committed "fraud on the court" during the underlying litigation so as to permit reopening of the final judgment against Summit. Magnet called as witnesses Dr. Elamir, Mr. Hanafy, Louis and Kenneth Gallo (the lawyers who tried the case on behalf of Summit), and Ronald Hynes (Magnet's principal). The Post-Judgment Defendants called Scott Sheldon, the trial lawyer for Magnet. The testimony established the following:

- In June 1994, Summit transferred its operations to Irvington MRI, an entity also owned by Dr. Elamir, as part of the settlement of a trademark infringement suit

with another entity over the name "Summit."

- In July 1994, within weeks of Summit's settlement of the trademark infringement action, Magnet began receiving payment from Irvington MRI under the service contract.
- In late December 1994, a dispute arose between Magnet and Summit (by then known as Irvington MRI) concerning the service contract.
- In February 1995, Magnet filed suit against Summit for breach of the service contract.
- In April 1995, an answer and counterclaim was filed on behalf of "Summit MRI, Inc., now known as Irvington MRI, Inc."
- In May of 1995, counsel for Magnet deposed Dr. Elamir and learned that Summit was then "in existence, but [was] not an active corporation." Rather, the MRI center previously known as Summit was operating as Irvington MRI.
- Magnet's principal "suggested" at the time of the original suit that Irvington MRI "might be liable."
- Based on the information gathered in the deposition of Dr. Elamir, Magnet's trial counsel actually "considered the possibility of adding . . . Irvington [as a party to the original action] but ultimately chose not to do so for whatever reason."

During oral argument at the close of the post-trial (and post-appeal) evidentiary hearing, counsel for Magnet reiterated that he was only seeking to "reopen

this case" in order "to assert new claims against new parties." (Pet. App. at 25a.) When counsel for Summit reminded the trial court that Magnet had ***not*** sought an amended judgment, the Court responded that it would not "quibble with the niceties with respect to what [they're] seeking." (*Id.*) The trial judge then ruled from the bench that "there ha[d] been a fraud committed upon the Court." (*Id.* at 26a.) Specifically, he noted that "Summit MRI, Inc. filed a counterclaim asserting that there were damages," (*id.* at 27a), and "confusing testimony" had been given during a pre-trial deposition concerning the relationship of Summit and Irvington MRI, (*id.* at 28a).

Based on these findings, the trial judge not only reopened the case to permit the filing of an amended complaint as requested by Magnet, but also "exercis[ed] his equity jurisdiction" to "amend the judgment" to include as jointly and severally responsible defendants not only Irvington MRI (Summit's successor), but also all of the Post-Judgment Defendants. (*Id.* at 30a.) According to the trial court: "The Court has its equity power to do whatever it believes [needs] to be done in order to be able to amend the judgment or get relief from the judgment *or include whatever it desires to include in the judgment.*" (*Id.* at 25a (emphasis added).) As for the Post-Judgment Defendants' fundamental due process right to an opportunity to defend against the merits of Magnet's claims, the trial judge stunningly concluded that they had no "interest" in such. (*Id.* at 30a.) Thereafter, the trial judge filed a supplemental written opinion. (*Id.* at 17a-22a.)

On July 29, 1999, the trial court issued a written order purporting to memorialize his rulings. (*Id.* at 14a-16a.) In that order, the court granted Magnet's

application to reopen the judgment against Summit. (*Id.*) In addition, the court ordered that the Post-Judgment Defendants be held "jointly and severally" liable for the judgment rendered against Summit, including the entire amount of interest on the original judgment since its entry against Summit in 1997. (*Id.*)

The Post-Judgment Defendants appealed. Before the New Jersey Superior Court-Appellate Division, the Post-Judgment Defendants argued that the record was devoid of evidence to support a finding of "fraud on the court" and that, even were there evidence of fraud on the court authorizing the trial court to ***reopen*** the original judgment to permit the filing of an amended complaint against the Post-Judgment Defendants, due process precluded the trial court from unilaterally ***amending*** the judgment to include those parties as judgment-debtors without the benefit of a hearing on the claims that gave rise to the judgment. (*See id.* at 9a.)

The Appellate Division summarily dismissed these arguments without serious review. The court simply stated that the trial court's finding of fraud on the court was "supported by substantial evidence in the record." (*Id.*) Similarly, the Appellate Division rejected the Post-Judgment Defendants' due process argument. (*Id.*) According to the Appellate Division, Dr. Elamir, as the sole shareholder of Summit, "had every fair, effective opportunity to be heard . . . on the underlying claim when the suit was initially tried." (*Id.* at 10a.) With regard to the newly-added corporate defendants, the court concluded that they "were also afforded every fair opportunity to be heard through [Dr.] Elamir, their sole proprietor." (*Id.* at 10a.) As for this Court's recent decision in *Nelson v. Adams USA,*

Inc., 120 S. Ct. 1579 (2000), rejecting the very arguments now relied upon by the Appellate Division, the court concluded – without explanation – that that decision could be "distinguished." (*Id.*)

The Post-Judgment Defendants then petitioned the New Jersey Supreme Court for certification and further claimed an appeal as of right on the due process issue. By order filed October 11, 2000, the New Jersey Supreme Court denied the petition for certification and dismissed the appeal as of right without explanation. (*Id.* at 1a.)

REASONS FOR GRANTING THE WRIT

This is the rare case warranting summary reversal by this Court. Last term, in *Nelson v. Adams USA, Inc.*, *supra*, this Court granted certiorari – in the absence of any circuit split – to redress the wholesale disregard of due process rights by a court that permitted the filing of an amended pleading after judgment ***and*** then, in a single stroke, amended the prior judgment against a corporation to include the corporation's sole shareholder as a judgment-debtor. *See* 120 S. Ct. at 1582-83. The violation of due process rights at issue here is even more egregious, for the court below not only permitted a *post hoc* amendment of the original judgment against Summit to include Summit's sole shareholder (Dr. Elamir), but also to include several other corporations (Kennedy, JCNC, and Paterson) owned by that shareholder. In so doing, the Appellate Division devoted an entire two sentences to addressing the *Nelson* decision – the first to acknowledging the existence of the case and the second to asserting without elaboration that it could be factually "distinguished." (Pet. App. at 10a.) Such brazen disregard of this Court's decision, and the

resultant violation of the Post-Judgment Defendants' fundamental due process rights, warrants summary reversal by this Court.

I. The Decision in *Nelson* Precluded the *Post Hoc* Amendment of a Judgment to Include Additional Judgment Debtors Without the Benefit of a Hearing on the Merits of the Claims That Gave Rise to the Judgment.

In *Nelson*, Ohio Cellular Products ("OCP"), a corporation wholly owned by Donald Nelson, sued Adams USA, Inc. ("Adams") in federal court for patent infringement. 120 S. Ct. at 1582. The district court dismissed OCP's complaint and awarded attorney's fees to Adams. *Id.* at 1583. When Adams learned that OCP might be unable to satisfy the fee award, Adams moved to amend its original pleading to add Nelson personally as a party to the case. *See id.* The district court, however, "allowed the pleading amendment ***and*** altered the judgment at a single stroke" to include Nelson as a judgment-debtor. *Id.* The court of appeals, in affirming, acknowledged that it was "uncommon" to permit the addition of a party after entry of judgment. *Id.* Nevertheless, the court of appeals concluded that due process had been given since Nelson had not shown that "anything different or additional would have been done to stave off the judgment had [he] been a party . . . from the outset of the litigation." *Id.* (internal quotes omitted).

This Court *unanimously* reversed. As the Court explained, the fault with the district court's action was not that it permitted amendment of the original pleading, but that it "immediately adjudged Nelson personally liable the moment he was made a party." *See id.* at 1584. "[D]ue process does not countenance such swift passage from pleading to judgment in the

pleader's favor." *Id.* Rather, a potential party must be permitted a "right to respond *on the merits* of the case belatedly stated against him in his individual capacity." *Id.* (emphasis added). This opportunity to respond on the merits must be afforded "through the process of litigation [the] rules of civil procedure prescribe." *See id.* at 1586.

II. The Decision Below Disregarding *Nelson*.

The issue presented in the case at bar is identical to that in *Nelson* and the deprivation of fundamental rights equally grave. In this case, Magnet moved the trial court only to reopen the judgment to permit the filing of an amended complaint against the Post-Judgment Defendants. The trial court, refusing to "quibble with the niceties" of the scope of the relief sought, granted much more than requested:

> IT IS . . . ORDERED that [Magnet's] application for relief under Rule 4:50 is GRANTED and [Magnet's] final judgment be and hereby is OPENED; ***and*** IT IS FURTHER ORDERED that final judgment be and is hereby entered in favor of Plaintiff . . . and against Defendants . . . .

(Pet. App. at 16a (emphasis added).) In other words, what the trial judge did here is precisely what this Court unanimously condemned in *Nelson*: he entered judgment against new parties "the moment permission to amend the pleading was granted" without affording the newly-minted defendants an opportunity to mount a defense to the merits of the underlying claims in a "reliable and orderly course." *See Nelson*, 120 S. Ct. at 1584.

In rebuffing the Post-Judgment Defendants' due process challenge to the trial court's actions here, the Appellate Division reasoned that due process was satisfied because Dr. Elamir, "[a]s the sole owner of the corporations involved, had every fair, effective opportunity to be heard both on the underlying claim when the suit was initially tried and on the motion to reopen and add additional defendants." (Pet. App. at 10a.) This very argument was considered and rejected in *Nelson*. There, the judgment to which Nelson was added had previously been entered against OCP, a corporation of which he was the sole shareholder. The Supreme Court considered whether affording Nelson a hearing on Adams's motion to reopen the original judgment against OCP before adding Nelson to that judgment constituted due process. The Court unequivocally concluded that it did not:

> It is true that Nelson knew as soon as Adams moved to amend the pleading and alter the judgment that he might ultimately be subjected to personal liability. Once could ask, therefore, whether Nelson in fact had a fair chance, before alteration of the judgment, to respond and be heard. . . . [D]ue process . . ., however, demand[s] a more reliable and orderly course.

Nelson, 120 S. Ct. at 1584.

Nevertheless, the Appellate Division adopted this discredited reasoning and took it one step further, holding that the original trial against Summit combined with the hearing on Magnet's motion to reopen the judgment resulting from that trial satisfied

due process not only as to Dr. Elamir (Summit's sole shareholder) but also as to *all other corporations owned by him.* (Pet. App. at 9a-10a.) By employing such reasoning, the Appellate Division effectively ignored an unequivocal directive of this Court. Such disregard of controlling precedent must be remedied by this Court. *See, e.g., Newsweek, Inc. v. Florida Dep't of Revenue,* 522 U.S. 442, 443 (1998) (summarily reversing a decision of the Florida district court of appeals given its "fail[ure] to consider" a controlling Supreme Court precedent).

I. The Decision in *Nelson* Cannot be Meaningfully Distinguished.

Magnet will likely argue, relying on this Court's reference in *Nelson* to the decision in *Fromson v. Citiplate, Inc.*, 886 F.2d 1300 (Fed. Cir. 1989), that Summit's supposed failure to disclose the transfer of its operations to Irvington MRI (*i.e.*, the alleged "fraud on the court") justifies the drastic measures taken here. But even assuming *arguendo* that fraud on the court was committed, this Court's reference to the *Fromson* decision provides no basis for amending the judgment here to include parties other than Irvington MRI as judgment-debtors.

In *Fromson*, the plaintiff moved before trial to add the individual owners of a corporation as defendants given the plaintiff's suspicion that the defendant corporation might be unable to satisfy any resulting judgment. 886 F.2d at 1301. The district court denied the motion in reliance on the corporation's false assurances that it was solvent. *Id.* Nevertheless, shortly after a judgment issued against the defendant corporation, the defendant corporation filed for bankruptcy protection. *Id.* Under these circumstances, the Federal Circuit held that, to the

extent a post-trial amended judgment denied the new judgment-debtors due process, it was "a bed of their own making" given that they "acted deliberately to derail" their pre-trial addition as defendants. *See Nelson*, 120 S. Ct. at 1585.

Here, the trial court concluded that "confusing testimony" in a pre-trial deposition concerning the transfer of operations from Summit to Irvington MRI constituted fraud on the court and thus justified amending the judgment after the fact. But even under *Fromson*, such supposed fraud would only allow for amendment of the judgment to include Irvington MRI as a judgment debtor since the fraud, at most, "derailed" the pre-trial addition of Irvington MRI as a defendant to the action. Petitioners do not contest the addition of Irvington MRI as a judgment-debtor. But the courts below went far beyond the holding of *Fromson* by adding not only Irvington MRI, but also Dr. Elamir, Kennedy, JCNC, and Paterson as judgment-debtors without the benefit of a hearing on the merits of Magnet's breach of contract claim that gave rise to the judgment. This was error of constitutional magnitude.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision below summarily reversed. In the alternative, the Court should grant the petition for a writ of certiorari and set the case down for full briefing and oral argument on the merits.

Respectfully submitted,

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APPENDICES

APPENDICES

SUPREME COURT OF NEW JERSEY

MAGNET RESOURCES, INC.

V.

MAGDY ELAMIR

NOS. C-187 SEPT. TERM 2000, 50,064

OCTOBER 11, 2000

DISPOSITION: DENIED

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT
OF NEW JERSEY
APPELLATE
DIVISION
DOCKET NO.
A-6857-98T5
A-1726-99T5
A-2173-99T5

MAGNET RESOURCES, INC.,

Plaintiff-Respondent,
v.

MAGDY ELAMIR, KENNEDY MRI, INC., IRVINGTON MRI, P.A., PATERSON MRI, P.A., and JERSEY CITY NEUROLOGICAL CENTER, INC.

Defendants-Appellants,
and

SUMMIT MRI, INC.,

Defendant.

MAGNET RESOURCES, INC.,

A-1726-99T5

Plaintiff-Respondent,

and
KAREN L. SUTER, ACTING COMMISSIONER

OF BANKING AND INSURANCE,
LIQUIDATOR
OF AMERICAN PREFERRED PROVIDER
PLAN,

Plaintiff/
Intervenor-Respondent,

v.

MAGDY ELAMIR, SUMMIT MRI, INC.,
KENNEDY MRI, INC., IRVINGTON MRI,
P.A., PATERSON MRI, P.A., and JERSEY
CITY NEUROLOGICAL CENTER, INC.,

Defendants-Appellants.

MAGNET RESOURCES, INC., A-2173-99T5

Plaintiff-Respondent,

and

KAREN L. SUTER, ACTING
COMMISSIONER
OF BANKING AND INSURANCE,
LIQUIDATOR
OF AMERICAN PREFERRED PROVIDER
PLAN,

Plaintiff/Intervenor-Appellant,

v.

MAGDY ELAMIR, SUMMIT MRI, INC.,
KENNEDY MRI, INC., IRVINGTON MRI,

P.A.,
PATERSON MRI, P.A., and JERSEY CITY NEUROLOGICAL CENTER, INC.,

Defendants-Respondents.

Submitted: May 24, 2000 - Decided: JUN 20 2000
Before Judges Stern, Kestin and Steinberg.
On appeal from the Superior Court of New Jersey, Law Division, Civil Part, Essex County.
Matthew T. Martens argued the cause for Magdy Elamir, Summit MRI, Inc., Kennedy MRI, Inc., Irvington MRI, P.A., Paterson MRI, P.A., and Jersey City Neurological Center, Inc.
(Latham & Watkins, attorneys; Mr. Martens and, with Michael Chertoff and Eric H. Jaso, of counsel and on the brief).
Emerald Erickson Kuepper, Deputy Attorney General, argued the cause for Commissioner Suter (John J. Farmer, Jr., Attorney General, attorney; Nancy Kaplen, Assistant Attorney General, of counsel; Ms. Kuepper, on the brief).
Robert J. Stickles argued the cause for Magnet Resources, Inc. (Carpenter, Bennett & Morrissey, attorneys; Mr. Stickles, of counsel and, with Marc E. Wolin, on the brief).

PER CURIAM

In related matters, defendants appeal from two orders of the trial court, and the intervenor appeals from one order. We consolidate the three appeals for the purposes of this opinion.

In A-6857-98, defendants Magdy Elamir, M.D. (Elamir), Kennedy MRI, Inc. (Kennedy), Irvington MRI, P.A. (Irvington), Paterson MRI, P.A. (Paterson), and Jersey City Neurological Center, Inc. (Jersey City) appeal from an order of the Law Division, Essex County, entered on July 29, 1999, which reopened a previously entered judgment against Summit MRI, Inc. (Summit) and added additional parties defendant to be held jointly and severally liable on the judgment. In A-1726, defendants appeal from an order entered while the appeal in A-6857-98 was pending, mandating the turnover of assets seized pursuant to plaintiff's execution on the judgment. In A-2173-99, the Acting Commissioner of Insurance (Commissioner), as intervenor in the matter, appeals from the second decretal paragraph of the Law Division's December 20, 1999 order, which denied the Commissioner's motion to stay the turnover order.

To lay hands on the issues before us in these appeals, it is not necessary to recount in detail the procedural histories or factual underpinnings of the lawsuits involved in this matter or the intricacies of the relationships between the parties. A summary will suffice, expanded with such detail as may be necessary to provide adequate focus on the questions we are called upon to resolve.

Elamir is the sole shareholder and operating principal of the defendant corporations and of other business entities involved in a related matter. The judgment which is at the heart of this matter

eventuated from a lawsuit brought by plaintiff, Magnet Resources, Inc. (Magnet), alleging Summit's breach of two contracts for servicing Summit's MRI equipment. Beginning in 1993 or 1994, Summit regularly defaulted on its payment obligations to Magnet for services rendered. Kennedy was named as an additional defendant on a claim of failure to pay for emergency repairs to its equipment. In the complaint as originally filed, Elamir was also named separately as an individual defendant, as was the corporations' accountant. In pretrial proceedings, summary judgment was granted to Magnet on its claim against Kennedy; and Magnet's claims against the individual defendants were dismissed. The claims against Summit proceeded to trial along with Summit's counterclaim against Magnet. A jury awarded $492,320 to Magnet on its claim and $18,470 to Summit on its counterclaim. On cross-appeals, we affirmed the judgment against Summit and vacated the judgment on the counterclaim. Magnet Resources, Inc. v. Summit MRI, Inc., 318 N.J. Super. 275, 298 (App. Div. 1998).

Meanwhile, Magnet had commenced supplementary proceedings on its judgment while the appeal was pending, and discovered that Summit had effectively ceased doing business on its own account in 1993. It also came to light that several of Elamir's other corporate entities including Kennedy, Irvington, Paterson, and Jersey City had absorbed Summit's assets and revenues and, along with Elamir individually, had concealed those facts and acted in other ways to derogate the rights of Summit's creditors. Magnet moved to reopen the judgment, alleging, inter alia, that Elamir's certifications and other documents filed in the lawsuit had presented facts and taken

positions stating the contrary and otherwise creating the impression that Summit was viable and functioning. Judge Minuskin, who had presided over the trial of the matter, entered an order to show cause why Magnet should not be permitted to reopen the judgment and amend its complaint to assert claims of fraudulent transfer, common law fraud, alter ego, and successor liability against Elamir and his companies for the amount of the judgment previously entered against effectively defunct and judgment-proof Summit. On the return date of the order to show cause, further discovery was ordered and, in June 1999, a four-day hearing was held. At the close of the hearing, on June 28, Judge Minuskin found, inter alia:

> there has been a fraud committed upon the Court and ... there is clear and convincing evidence that this is so.
>
> ***
>
> ...Dr. Elamir ... operated all those corporations in such a manner that whatever indebtedness had occurred, it would be paid out of a corporation that had money to pay the same.
>
> ***
>
> I think Dr. Elamirin his operations ... was perpetrating a fraud upon the plaintiff and now [,] when it comes to collecting [,] a fraud upon the Court[;] and I believe that [the] protection ... he seeks to have and believes ... he did have by virtue of being [incorporated], ... is one that should be pierced.

In his supplemental opinion letter dated July 27, 1999, Judge Minuskin concluded:

> It clearly and convincingly appears that the corporations were used simply as alter egos of Dr. Elamir for the purpose of obtaining income for his own benefit and defeating the claims of creditors.

Based on his findings and conclusions, Judge Minuskin ordered that the prior judgment of $492,320 against Summit be amended and reentered against Elamir, Irvington, Paterson, Kennedy, and Jersey City, as well as Summit. The appeal in A-6857-98 has been taken from that order.

While the appeal was pending, Magnet sought and obtained a turnover order in respect of assets which had been levied upon in execution of the judgment. That order is the subject of the appeal in A-1726-99. We stayed it on an emergent application and subsequently extended the stay pending resolution of all three related appeals.

The third appeal, in A-2173-99, arises from the Commissioner's status, under the Life and Health Insurers Rehabilitation and Liquidation Act (the Act), N.J.S.A. 17B:32-31 to -91, first as rehabilitator and then as liquidator of another corporation belonging to Elamir. Acting pursuant to the Act's comprehensive scheme for the rehabilitation or liquidation of insurers in precarious financial condition, the Commissioner, in late 1998, had filed a complaint in the Chancery Division, Mercer County, for "an order of rehabilitation of a health maintenance organization", American Preferred Provider Plan, Inc. (APPP). The named defendants were Elamir, "active officer and individually"; Kennedy and Irvington, which had both furnished capital and surplus guarantees to the State of New Jersey when APPP was formed; and APPP itself, of which Elamir was the sole shareholder. Among the

allegations of the complaint were assertions that APPP had failed to maintain an adequate net worth, that loans had been made improperly to other entities owned by Elamir, and that there had been improper transfers through APPP to Elamir or his relatives or other of his corporations of more than five million dollars in Medicaid funds. A rehabilitation order was entered by consent on December 10, 1998; it was followed by an order for liquidation entered on April 20, 1999. By order of November 10, 1999, an earlier posting requirement for Elamir to deposit $848,506.84 in cash or bond was superseded by a restraint against Elamir from transferring certain of his property until further order of the court.

In the meantime, on October 21, 1999, counsel for Elamir had advised the Commissioner for the first time that a judgment creditor, Magnet, had levied upon assets that were arguably subject to the Chancery Division's jurisdiction in the suit under the Act. The Attorney General represents on behalf of the Commissioner that no prior disclosure had been made of the expanded judgment that resulted from the Law Division proceeding. We extended our stay of the Law Division's turnover order on the Attorney General's emergent application after the Commissioner's motion to intervene in the Law Division matter had been granted, but her application for vacation or a stay of the turnover order had been denied.

In A-6857-98, we now affirm the Law Division's rulings reopening the judgment in its matter and adding the additional defendants. The findings upon which those rulings were based are supported by substantial evidence in the record and are therefore entitled to deference on review. Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974); see

also Bonnco Petrol, Inc. v. Epstein, 115 N.J. 599, 607 (1989); Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 395-96 (App. Div. 1.989), certif. denied, 121 N.J. 607 (1990). We are in substantial agreement with Judge Minuskin's views concerning the significance of the facts he found and the conclusions he reached. Cf. Karo Marketing Corp. v. Playdrome America, __ N.J. Super. __ (App. Div. 2000) (referring to a number of factual assertions which, "if ultimately credited by a fact-finder, clearly . . . demonstrate actionable fraud" perpetrated in order to frustrate judgment creditors) (slip. op. at 11).

The due process of law argument advanced by defendants has no merit. Dr. Elamir was the only natural person newly held subject to the judgment. As the sole owner of the corporations involved, he had every fair, effective opportunity to be heard both on the underlying claim when the suit was initially tried and on the motion to reopen and add additional defendants. The newly added corporate defendants were also afforded every fair opportunity to be heard through Elamir, their sole proprietor. To hold otherwise would elevate the form of due process over its substance: the guarantee that every party to be held have a fair and effective opportunity to be heard. No different due process standard was applied in recently decided Nelson v. Adams USA, Inc., __ U.S. __, 120 S. Ct. 1579, __ L. Ed. 2d __ (2000). In announcing its decision in that matter, the Supreme Court distinguished the facts of the case, which led to its conclusion that the party to be held "was never afforded a proper opportunity to respond to the claim against. him[,]" id., 120 S. Ct. at 1585, from those in Fromson v. Citiplate, Inc., 886 F.2d 1300 (1989), which reached a contrary conclusion on facts very

similar, in the due process sense, to those before us in the instant matter.

As for the questions before us in A-2173-99, the Commissioner's appeal, it is clear that critical issues of fact and law remain to be resolved before it can be determined whether her statutory charge as liquidator of a failed HMO to marshal available assets supersedes the right of a preexisting judgment creditor whose claim to assets arises from a separate decree against some of the persons and entities involved in the Commissioner's suit and others as well. The effect of the capital and surplus guarantees furnished by Kennedy and Irvington must be determined as a matter of law. Given the timing and sequence of events, does the existence of the guarantees create a claim under the Act in respect of the guarantors' assets that has priority over the civil judgment which springs from their day-to-day operations? A court must also determine the extent to which, if at all, as between Dr. Elamir's statutorily-sourced obligations and those emanating from the civil judgment in the Law Division action, his personal assets can be segregated for different treatment in respect of different claims, or must all be treated similarly. As a matter of fact, is there a sufficient relationship between APPP and each of the corporate judgment debtors to justify holding the assets of the latter to be reachable for the obligations of the former? To the extent that any of the defendants newly added to the Law Division judgment are not already subject to the Chancery Division's jurisdiction, should they be, and can they be added as parties?

These are only some of the questions which must be addressed that occur to us at first blush. Others will certainly arise as the matter is taken up in detail.

It remains to be determined how and by which of the trial courts involved to date the additional issues should be handled. The latter question is the easiest one presented on the record before us. With the single exception of the questions regarding entitlement to available assets, which embody considerations common to both proceedings, all of the issues that pertain specifically to the Law Division matter have been resolved and determined. Some issues remain to be resolved in the Chancery Division matter, however. It makes sense, therefore, that the entitlement and priority issues that are engendered by the two matters should be resolved where other issues pend as well. Accordingly, in A-2173-99, we remand the matter to the Chancery Division, Mercer County for such other proceedings as may be required including, as by operation of principles of pendent jurisdiction, any new questions that may arise with respect to the contract action. As to how the remaining issues should be resolved, we leave that to the good judgment of the Chancery Division judge; including a determination whether, in order to dispose of all related issues completely, it is necessary to accord Magnet intervenor status in the Chancery Division action.

Obviously, there must be a continuation, pending further order of the Chancery Division, of the stay regarding the turnover of assets that have been levied upon. Accordingly the appeal in A-1726-99 must also be remanded to the Chancery Division for such disposition as it may deem appropriate.

To summarize, the order of the Law Division, Essex County, under appeal in A-6857-98 is affirmed. That court's order under appeal in A-2173-99 is vacated and the matter is remanded to the Chancery Division, Mercer County for consolidation into pending Docket

No. C-119-98, the statutory rehabilitation/liquidation suit; for such further proceedings as the Chancery Division may deem to be required; and for a determination of how the assets which have been levied upon pursuant to the expanded judgment in Docket No. ESX-L-2156-95 should be distributed, including resolution of any ancillary issues which must be addressed. The stay respecting a turnover of those assets is continued pending further order of the Chancery Division, and A-1726-99 is accordingly remanded as well to the Chancery Division, Mercer County. As to the matters remanded, we do not retain jurisdiction.

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Attorneys for Plaintiff

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO.: ESX-L-2156-95 Civil Action

MAGNET RESOURCES, INC.,
Plaintiff,
v.
MAGDY ELAMIR, M.D., MOHAMMED HANAFY, SUMMIT MRI, INC., and KENNEDY MRI, INC.,
Defendants.

SUPPLEMENTAL ORDER AND JUDGMENT

THIS MATTER having come before the Court on the application of Magnet Resources, Inc. ("MRInc.") pursuant to Rule 4: 50 to open the Final Judgment entered on July 7, 1997 so as to pursue additional claims against certain additional persons; and there being appearances by Carpenter, Bennett & Morrissey, attorneys for plaintiff (Robert J. Stickles, appearing) and Latham & Watkins, attorneys for Magdy Elamir, Irvington MRI, P.A., Irvington MRI, Inc., Paterson MRI, P.A., Paterson MRI, Inc., Jersey City Neurological Center Inc., and Kennedy MRI (Michael Chertoff, appearing) and Kevin Marino, P.C., attorneys for Mohammed Hanafy (Kevin Marino, appearing) and Gallo & Gallo, attorneys for Summit MRI Inc. (Kenneth Gallo, appearing); and the Court having previously presided at the jury trial conducted on June 12, 16, 17, 18, 19, and 23, 1997, between MRInc. and Summit MRI, Inc.; and the Court having entered a Final Judgment on July 7, 1997 stating, inter alia, that judgment be entered in favor of MRInc. and against Summit MRI, Inc. in the amount of Four Hundred Ninety Two Thousand Three Hundred Twenty dollars ($492,320.00); and the Court having heard oral argument on MRInc.'s application on May 6, 1999, and the Court having conducted an evidentiary hearing regarding MRInc. ' s application on the following dates: June 16, 21, 22 and 28, 1999; and the Court having heard the testimony of Dr. Magdy Elamir, Mohamed Hanafy, Ronald Hynes, Scott J. Sheldon, Esq., Louis Gallo, Esq., and Kenneth Gallo, Esq.; and the Court having evaluated the evidence and having considered the credibility of the witnesses and their testimony; and the Court having concluded that Summit MRI, Inc. through Magdy Elamir, and Dr. Elamir's other companies, Irvington

MRI, P.A., Irvington MRI, Inc., Paterson MRI, P.A., Paterson MRI, Inc., Jersey City Neurological Center, Inc., and Kennedy MRI, Inc. committed a fraud on the Court and a fraud upon MRInc.; and the Court having determined, for the reasons expressed from the bench on June 28, 1999 and in a written opinion dated July 27, 1999, that relief is warranted pursuant to, among other things, Rule 4: 50-1(c) and 4:50-1(f) and 4:50-3; and for good cause shown,

IT IS, this 29th day of July, 1999,

ORDERED that MRInc.'s application for relief under Rule 4:50 is GRANTED and MRInc.'s final judgment be and hereby is OPENED; and

IT IS FURTHER ORDERED that final judgment be and is hereby entered in favor of Plaintiff, Magnet Resources, Inc. and against Defendants Magdy Elamir, Irvington MRI, P.A., Irvington MRI, Inc., Paterson MRI, P.A., Paterson MRI, Inc. , Kennedy MRI, Inc., and Jersey City Neurological Center, Inc., jointly and severally, in the amount of Four Hundred Ninety Two Thousand Three Hundred Twenty dollars ($492,320.00) together with post-judgment interest from July 7, 1997 and costs; and

IT IS FURTHER ORDERED that a copy of this Order shall be served on all parties within seven (7) days from the date hereof.

HON. ARTHUR J. MINUSKIN, J.S.C.

SUPERIOR COURT OF NEW JERSEY
ESSEX VICINAGE

CHAMBERS OF
ARTHUR MINUSKIN
JUDGE T/A

ESSEX COUNTY COURTS
BUILDING
NEWARK. NEW JERSEY
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July 27, 1999

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Re: Magnet Resources, Inc. v. Summit MRI, Inc., et als.
Docket No. ESX-L-2156-95

Dear Counsel:

In accordance with R. 2:5-1 (b), I am writing to supplement my bench decision of June 28, 1999, in this matter.

On July 7, 1997, plaintiff Magnet Resources, Inc. ("Magnet") obtained a judgment against defendant Summit MRI, Inc. ("Summit") in the sum of $492,320.00 based upon a complaint for breach of contract. Magnet and Summit entered into a contract for the sale and service of MRI units at its locations in Paterson and Irvington. This judgment is based on a breach of this contract. Dr. Magdir Elamir is Summit's sole shareholder. In the course of enforcing its judgment against Summit, Magnet determined that Dr. Elamir had diverted the assets of Summit to other corporations he owned and controlled. Magnet now seeks, pursuant to R. 4:50, an order to amend the judgment against Summit to include Dr. Elamir and his accountant, Mohammed Hanafy, as well as the other corporate entities to which assets were diverted. The court ordered a hearing to determine the facts and circumstances of plaintiff's claims.

The court has heard the testimony of Dr. Magdir Elamir, principal and sole shareholder of the corporations;[1] Mohammed Hanafy, the accountant for the Elamir entities; Scott Sheldon, who represented the plaintiff; Louis Gallo and his son Kenneth Gallo, two attorneys who represented Summit; and Ronald Haynes, president of the

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[1] The corporate entities with Dr. Magdir Elamir as the sole shareholder and referred to in this opinion are: Summit MRI, Inc., Irvington MRI, Inc., Paterson MRI, Inc., Paterson MRI, P.A., Irvington MRI, P.A., Kennedy MRI, Inc. and Jersey City Neurological Center, Inc.

plaintiff Magnet. In the course of the hearing, I had the opportunity to observe the demeanor of the witnesses as they testified and to assess their credibility. I grant the application of the plaintiff, except for the inclusion of Mohammed Hanafy, based upon the following findings of fact and conclusions of law.

In a counterclaim filed in the underlying action against Summit, Dr. Elamir and Mr. Hanafy claimed that Summit sustained lost profits for 5-1/2 days during the last week of December 1994 in the amount of $28,968.75. Extrapolating that figure for a full year, it becomes apparent that the MRI operations conducted by Dr. Elamir and the corporations involved generated revenues and, very likely, profits of $1,000,000. annually.

All the corporations involved were owned by Dr. Elamir. At all times Mr. Hanafy was the accountant and financial advisor for Dr. Elamir and his corporations. At the hearing, Dr. Elamir testified that on occasion Summit used the name Irvington, MRI, Inc., to avoid confusion with another corporation dispensing medical services in the area. The credible testimony established that Magnet's invoices were paid by corporations other than Summit, to which the invoices were addressed. In explanation for that, Mr. Hanafy stated that when Summit did not have the money to pay, funds were taken out of other corporations -- and that there was supposed to be an accounting among the corporations as to such items. However, there was no evidence that any change in assets or that any accounting took place in order to satisfy the corporations which dispensed money in payment of the obligations of Summit.

It is obvious that the corporations were used interchangeably for the benefit of Dr. Elamir without regard to where legal obligations had been created. It is also apparent that had funds not been withdrawn by Dr. Elamir for his own purposes from the corporations, there would have been more than sufficient assets to satisfy the claims of creditors, including plaintiff. It clearly and convincingly appears that the corporations were used simply as alter egos of Dr. Elamir for the purpose of obtaining income for his own benefit and defeating the claims of creditors.

R.4:27-2 provides in pertinent part that "a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to plaintiff, without first having obtained a judgment establishing the claim for money." While when this action commenced Dr. Elamir and his various corporations were not joined as parties defendant, as plaintiff could have under the Rules of Court, it was not until depositions and discovery were taken in an attempt to collect the judgment against Summit that the relationship between Dr. Elamir and the other corporations became evident. In permitting the joinder of these corporations after a full and complete hearing, the court is permitting a joinder of defendants at the conclusion of the case that would have been done when the case began had the plaintiff known about Dr. Elamir's intermingled entities.

R.4:27 was interpreted in Flood v. Caro Corp., 272 N.J. Super. 398 (App.Div. 1994), where the court dealt with the Uniform Fraudulent Transfer Act, Judge Cohen for the court, stated at p. 405:

> "A creditor who is entitled to a remedy under the Act has a range of protective possibilities. If the creditor has a judgment against the debtor, application may be made in the action for a court order permitting execution on the asset transferred or its proceeds. Section 29b. Such an application necessitates proceedings suitable to determine the rights of the parties, including possibly innocent transferees for value, perhaps requiring a plenary trial to determine disputed material facts." (citations omitted)

The evidence suggests that Mr. Hanafy may have participated in the fraudulent scheme by the advice which he gave to Dr. Elamir and that he may also be responsible. However, the authority relied upon by the court does not permit him to be included in the amended judgment.

Goldberg v. Yeskel, et al., 129 N.J. Eq. 404 (Ch. 1941), aff'd. 129 N.J. Eq. 410 (E.&A. 1941) is on its facts similar to the case at bar. There, as here, a debtor used corporate devices for the purpose for concealing assets upon which the creditor could levy. In finding that the plaintiff could levy upon assets which ostensibly were owned by corporations controlled by the true debtor, the court said at p. 408:

> "...Equity will in a proper case pierce through fiction to the reality. It will determine in whom the true ownership of assets lies and disregard

> legal title in its adjudication. (citations omitted) Neither judgments (citations omitted) nor the corporate entity (citations omitted) can prevent it from doing so and from setting aside a fraud perpetrated by means of a legal form."

An order consistent with this opinion should be presented by the plaintiff in accordance with the Rules.

Respectfully

Arthur Minuskin, J.S.C.
(T/A on recall)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO. ESX-L-2156-95

MAGNET RESOURCES, INC.
Plaintiff,

-vs-

ELAMIR, et al.
Defendants.

TRANSCRIPT
OF
PROCEEDINGS

Place: 50 W. Market Street
Newark, NJ 07102

Date: June 28, 1999

B E F O R E

THE HONORABLE ARTHUR J. MINUSKIN, J.S.C.

TRANSCRIPT REQUESTED BY:

ALNIECA BANKS, Paralegal (Latham & Watkins)

A P P E A R A N C E S :

ROBERT J. STICKLES, ESQ. (Carpenter, Bennett & Morrissey)

Attorney for the Plaintiff

KENNETH T. GALLO, ESQ. (Gallo & Gallo)

Attorney for Defendant Summit MRI, Inc.

MICHAEL CHERTOFF, ESQ. (Latham & Watkins)

Attorney for Defendant Elamir, et al.

KEVIN MARINO, ESQ.

Attorney for Defendant Hanafy

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Audio Recording

Plus I must say to the Court I've never seen that request coming from Plaintiffs in their motion papers. And, therefore, we have proceeded on the assumption that we are addressing the relief that Plaintiff seeks, and not some other possible --

THE COURT: Well, it's all contained within -- actually if he's seeking relief, he has to come under 4:50. There's no question about it.

And the Shamus (Phonetic) case was the one that said that. Of course the rule has been amended since then.

But that's the only rule under which this Court can grant any kind of relief from a judgment that's been entered.

The Court has its equity power to do whatever it believes to be done in order to be able to amend the judgment or get relief from the judgment or include whatever it desires to include in the judgment.

My understanding of the Shamus case, it's my understanding of all the other cases that deal with the Court's equity power in that regard.

So I don't think we ought to quibble with the niceties with respect to what their seeking. The Court was very clear has a clear understanding of what they're seeking and it was argued previously. There's not an issue here. There's not an issue that based upon what occurred at the time of trial was -- there was a question whether it was a breach of contract, there

Motion 42

Keep in mind too, that Dr. Elamir, getting back to the deposition testimony of Mr. Elamir, he testified that even though he changed the name and the operation of the business changed, he gave no letters to creditors because he didn't think he had to because he didn't dissolve the corporation.

That's all. Thank you, Your Honor.

THE COURT: All right. Thank you, Gentlemen.

I appreciate the arguments that have been presented at this time, as well as the memorandums that you have submitted in support of your arguments.

I have the distinct advantage of not -- perhaps even greater than your particular position as counsel for these parties to have been the Judge who presided at the trial and has a little bit more familiarity with the testimony and the ability to be able to evaluate the testimony and the witnesses and give whatever credibility the Court desires to give to them based upon their candor, the Court's evaluation of their ability to tell the truth and I emphasize that because that's a basis upon which the Court is relying in connection with making its findings at this hearing.

I do find -- I do find in the Court's opinion that there has been a fraud committed upon the Court and I do understand that it has to be by clear and convincing evidence, and the Court is satisfied that there is clear and convincing evidence that this is so.

Decision 43

There were several parties who were made defendants in this case at the initial trial and motion was made to release them and they were released because it was determined at that time that they had no connection with the case, there was no viable cause of action and I do believe that the Plaintiff's attorney exercised due diligence in the manner in which he proceeded in this particular case.

He had before him many of these corporations and he had the urgency of his client to sue them all, which I think lie very appropriately disregarded.

And he relied on what he would discover at the time of depositions and in Answers to Interrogatories and in the pleadings that were filed in this case.

And there's no question, not question in the Court's mind that the Defendant, Summit, Inc. -- Summit MRI, Inc. filed a counterclaim asserting that there were damages, there was loss of profits, loss of profits for their operations at Paterson and at Irvington and those loss of profits amounted to $28,968 for five and a half days of operation at those two facilities.

Now, it doesn't take any simpleton to transpose those figures as to what the profits would have been for a year, even if we assume like we do how many days a Judge may be sitting in a particular year and if you in fact use 200 days as a number of days, there's no question in the Court's mind, and perhaps

Decision 44

in Counsel's mind too, that there were profits that were emanating from this MRI of over one million dollars and he had no need in the interest of operating his business to see to it, that there was security interest or other kinds of things that he should have provided for in dealing with these Defendants.

But the Court finds as a fact that Summit MRI alleges in its counterclaim that it lost profits and in December, the last half of December, 1994, when it appears that after seeking to enforce its judgment it was discovered that it was not operating for a half a year, that it had changed its operations over to a new name called Irvington and there was support for the fact that this was a simple change of name.

Sure, there's confusing testimony about what Dr. Elamir stated at that deposition hearing, but the Court does believe, and having viewed the testimony of Dr. Elamir in the past, believes that that confusion was deliberate and intentional and that was all part of this fraud, to see to it that whatever judgment might be asserted against Summit MRI were they not successful would not in any way collectable.

The Court feels that there is greater support for that conclusion based upon the testimony that apparently came forth at the time the original trial as well as at this hearing, that Dr. Elamir apparently with Dr. -- with Hanafy, operated all those corporations in such a manner that whatever indebtedness had occurred, it would paid out of a corporation that had money

Decision 45

to pay the same. That's the testimony of this hearing.

And not even with the direction of Hanafy as to which corporation it was appropriate then to make payment for the same, but simply on the basis of a clerk's decision as to which, in the clerk's opinion, had money in order to satisfy the indebtedness that was claimed and due to the Plaintiff.

I don't feel that Mr. Sheldon didn't exercise due diligence. As a matter of fact, I find that he did.

And relying on the sentence in Shamus versus Shamus, on page 330, even absent use of due diligence, although for other good reason the failure to use due diligence is not a bar to relief.

And I think there is further good reason why due diligence in this particular case is not a bar to relief.

I think Dr. Elamir in his operations of this facility or these two facilities was perpetrating a fraud upon the Plaintiff and now when it comes to collecting a fraud upon the Court and I believe that his protection that he seeks to have and believes that he did have by virtue of being appropriated, I think is one that should be pierced.

I don't feel that he's been using these corporations for the purpose of -- for his own personal use and for that reason I think that there's been established fraud or injustice which would permit the Court to conclude that the corporate veil in this particular instance of all of his corporations

should be pierced.

And for those reasons I find that there is relief that should be granted the -- exercising his equity jurisdiction, should amend the judgment so as to include all of these defendants as defendants in the suit.

Now, what was the dispute? What was the issue in dispute? The issue in dispute here was the question of whether there was monies that were due to the Plaintiff.

There's no problem here of a trial or an issue which any of these Defendants would have any interest in.

That issue was tried.

The only question was the third element of that which gives a cause of action, namely has there been liability, namely has there been damages and, thirdly, is there a party against whom it's collectable.

And in that respect these Defendants are added in the Court's judgment as party defendants, where they may – this judgment may be pursued for satisfaction because of the fraud and because of the fact that it's the Court's opinion that a million dollars that came in during the year of 1994 went to one of these corporations and the Plaintiff should not be deprived of its ability to be able to collect the same.

So for those reasons, I'll amend the judgment to include these parties: Dr. Elamir individually and Mr. Hanafy individually as part of a scheme.

He came in here and he testified as to what these damages were to Summit Corporation when in fact it was his knowledge, and the Court believes it was his knowledge, that at that particular time he testified that there was no damages to this Summit Corporation, Summit MRI, Incorporated.

And I think he is part of this fraud that was perpetrated on the Plaintiff, and I so rule.

Thank you, Gentlemen. Submit an order.

MR. STICKLES: Thank you.

MR. CHERTOFF: Thank you, Your Honor.

(Off the record)

(Back on the record)

MR. CHERTOFF: -- a stay of the judgment so we can pursue an appeal?

AN ATTORNEY: Join in that application, Your Honor.

MR. STICKLES: I object, Your Honor. Let them --

THE COURT: How much is the judgment?

MR. STICKLES: About $498,000.

THE COURT: Want him to put up a bond for it?

MR. STICKLES: $492,000.

THE COURT: Want to put up a bond?

MR. CHERTOFF: Well, Your Honor, I don't know what the bond requirement would be at this point.

MR. STICKLES: Plus post judgment interest, Your Honor, which has been running since June or July of 1997,

almost two years.

MR. CHERTOFF: Your Honor, --

THE COURT: I'll grant the stay if you will put up a bond for the amount of the judgment including post judgment interest to this date.

MR. CHERTOFF: Your Honor, it's going to take a little bit of time to see about getting a bond, so --

THE COURT: You could make an application at any time.

MR. STICKLES: Thank you, Your Honor.

MR. CHERTOFF: I request thirty days, Your Honor, to put a bond up.

MR. STICKLES: I object. It shouldn't take thirty days.

MR. CHERTOFF: It's the summer, Your Honor, it's a little tough sometimes.

THE COURT: It's what?

MR. CHERTOFF: I said it's the summer, so it's a little tough sometimes.

THE COURT: We don't want to be wrapped up with the summer. I don't think the summer should make any difference.

Ten days.

MR. CHERTOFF: Thank you, Your Honor.

MR. STICKLES: Is Your Honor's ruling that the judgment is stayed for ten days?

THE COURT: For ten days pending --

Superior Court of New Jersey,
Appellate Division.

MAGNET RESOURCES, INC., Plaintiff-Respondent/
Cross-Appellant,
v.
SUMMIT MRI, INC., Defendant-Appellant/
Cross-Respondent,
Magdy Elamir, M.D., Mohamed Hanafy, and
Kennedy MRI, Inc.,
Defendants.

Submitted Sept. 29, 1998.
Decided Dec. 16, 1998.

Before Judges PRESSLER, BROCHIN and KLEINER.

The opinion of the Court was delivered by

BROCHIN, J.A.D.

This appeal arises from a breach of contract action. The two legal issues of particular importance with which we deal are: (1) the right of a contracting party that reasonably deems itself insecure because of the other contracting party's threatened material breach to demand concrete assurances of performance and to suspend its own performance pending their receipt; and (2) the extent, if any, to which a contracting party injured by the other party's material breach is entitled to include overhead and other fixed costs as part of its recovery of lost profits.

Plaintiff Magnet Resources, Inc. ("Magnet Resources") and defendant Summit MRI, Inc.

("Summit") each charged the other with a material breach of contract and sued for damages. Magnet Resources also sought damages from two officers of Summit, defendants Magdy Elamir, M.D., and Mohammed Hanafy, on the ground that they had induced Magnet Resources to continue performance of its agreements by fraudulent promises of payment. On pretrial motions for summary judgment, the claims against the individual defendants were dismissed and a partial summary judgment was entered in favor of Magnet Resources for $6,800. The parties' other breach of contract claims were tried to a jury. The jury found that both parties had breached, and it awarded $492,320 to Magnet Resources and $18,470 to Summit. Summit has appealed and Magnet Resources has cross-appealed.

Summit did not object to the trial court's jury instructions. However, it argues to us that the instructions were incomplete and misleading because the jury was not told that one party's material breach relieves the other party of its duty to perform. It also contends that the charge was erroneous because the jury was not instructed that, in determining damages, it should consider that the parties might have agreed to terminate their contracts before the expiration of their terms, and that Magnet Resources had the burden of proving that its overhead was fixed. In addition, Summit asserts that the court unduly limited Magnet Resources' duty to mitigate. Summit also argues that the court should have granted its motion for judgment notwithstanding the verdict because Magnet Resources failed to sustain its burden of proving that its overhead was fixed, that the

trial court abused its discretion by permitting Magnet Resources to reopen its case to provide additional testimony of its accountant to show that its overhead was fixed, and that the accountant should not have been permitted to offer that testimony because it was beyond the scope of his report.

Magnet Resources contests the entry of summary judgment dismissing its fraud claims against Dr. Elamir and Mr. Hanafy. Without having moved for judgment notwithstanding the verdict or for a new trial on damages, Magnet Resources also argues that "as a matter of law, [its] damages should be increased from $492,370 to $611,863," the full amount of its damage claim.

Magnetic resonance imagers ("MRIs") are devices used by physicians and hospitals for diagnostic purposes. Magnet Resources sells and services new and used MRIs. Summit operated MRI installations in Jersey City, Paterson and Irvington, New Jersey.[1] Magnet Resources contracted with Summit to provide preventive maintenance and emergency repair services for the MRIs at Summit's Paterson and Irvington installations. Magnet Resources also supplied cryogens[2] for all of Summit's installations, including its Jersey City installation.

The charge for the services to be provided for the Irvington installation was $120,000 for the first year and $150,000 annually for subsequent years of the

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1 Dr. Elamir, a neurologist, is the sole owner of Summit MRI, Inc.

2 MRIs require cryogens, which are essential coolants that need to be replenished weekly.

contract. Payments were to be made monthly in advance beginning with the fourth month of the contract. The testimony of both parties implies that there was a separate service agreement for the Paterson installation with terms similar to those of the Irvington contract, but the Paterson contract was not offered into evidence.[3] However, neither party attaches any significance to this omission. For purposes of the case, both parties treated the service agreements for the two sites as a single contract, and we will do the same.

Summit's monthly payments were habitually late. On May 10, 1994, Magnet Resources faxed a memorandum to Summit complaining that seven of its checks had been dishonored.[4] The memorandum declared that thereafter payments more than ten days late would have to be made by certified check, the provision of the service contracts imposing a surcharge for late payment would be enforced, and neither essential supplies nor emergency service would be provided except under special arrangements if an invoice was late by thirty days or more. On June 7, 1994, Magnet Resources faxed a memorandum to Summit complaining that it had still not received a $13,250 payment due for April.

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3 Hanafy testified that the price was lower for the Paterson installation and that this contract was otherwise almost exactly the same as the contract for the Irvington installation.

4 The dishonored checks were paid within a few days after they were returned.

On December 20, 1994, Summit requested repair service for its Jersey City installation. Magnet Resources had no contract for emergency service or preventive maintenance for that site. It declined to provide the service because Summit then owed it $35,000. Summit promised that if the necessary work was done, Magnet Resources would get "most of the money by the end of the week." In reliance on that promise, Magnet Resources installed a necessary piece of equipment from its inventory for a total charge of $8,750.

Neither that charge nor the other unpaid bills had yet been paid when Summit called a Magnet Resources service person at his home on Saturday, December 24, requesting immediate emergency service for its Paterson installation. Under its service contract, however, Summit was entitled to service only from Monday through Friday. Magnet Resource did not make the emergency repair.

On Tuesday, December 27, Summit still had not paid its outstanding bills to Magnet Resources. That day, the person in charge of Summit's Paterson facility telephoned Magnet Resources and urgently requested service for that site. The caller was informed that Magnet Resources would not respond because of Summit's continuing failure to pay overdue bills.

The director of Summit's centers called Ronald Hynes, Magnet Resources' president. The amount due and unpaid was then more than $40,000. Summit offered $10,000 if the emergency service problem was taken care of. Hynes refused; he

decided to suspend service until "things were improved, or somebody talked to us [Magnet Resources] and made some arrangements." He faxed a memorandum to Summit which referred to the previous week's payment promise and declared, "[W]e have suspended service to each site where payment is overdue." The suspension was effective December 27.

Some time after the suspension of service, Hynes spoke with Hanafy and complained that Summit had ordered cryogens from Magnet Resources' supplier on Magnet Resources' credit. Summit responded that it had made arrangements to have another company provide service for its sites. Summit changed the locks on its MRI installations to bar access by Magnet Resources' service personnel who previously had been able to enter to service the MRI's after regular business hours.

At trial, Magnet Resources' accountant, Thomas J. Veth, testified to the amount of anticipated profit it had lost as the result of Summit's cancellation of the contract. According to Veth, Magnet Resources had invoiced Summit $207,500 for services at the Irvington and Paterson installations in 1994. Of those amounts, direct costs, i.e., total costs for direct labor, supplies used for the particular job, and costs of service personnel going to and from the installations to perform their work, were $96,228 for the two sites. He calculated $6,000 as the cost of fringe benefits for the employees servicing the installations. Veth determined the gross profit ("gross" because it was calculated without deducting overhead) and calculated Summit's gross profit

percentage (i.e., gross profit divided by gross revenue) for each installation. He then calculated the total amount of revenue which would have been invoiced in the future for work at each site if the contracts had not been canceled. Multiplying those figures by the gross profit percentages, Veth concluded that if the contracts had not been canceled, Magnet Resources would have realized a gross profit of $559,821 on both contracts through their scheduled termination dates. Veth then added $32,500, the amount invoiced and unpaid for completed work. These figures, anticipated but unrealized gross profit and amounts invoiced but unpaid for completed work, totaled $592,321. Veth testified that the rounded-off present value of $592,321, calculated to June 10, 1997, which was close to the day the trial commenced, was $611,000. Magnet Resources claimed that amount as its damages.

After Magnet Resources had rested, Summit moved to limit Magnet Resources to the recovery of no more than one dollar in damages on the ground that it had failed to sustain its burden of proving that no part of its overhead expenses should be deducted from its anticipated gross profit to calculate its damages. The court agreed that Magnet Resources had the burden of proof on that issue and that it had failed to offer the necessary proof, but the court permitted Veth to be recalled to supply the missing evidence. Veth then testified that unallocated indirect costs and overhead expenses, such as rent, secretarial salaries, and officers' salaries, were not deducted from gross profits to calculate Magnet Resources' damages because Summit's termination of its contracts did not

avoid or reduce those expenses. Veth further testified that the termination of the Summit contract did not free up any of Magnet Resources' productive capacity to create additional revenue.

Summit presented Mohammed Hanafy as its expert accounting witness. He testified that Summit sustained a loss of $28,968.75 when Magnet Resources' failure to repair the MRI machine at its Paterson center in December 1994 left the machine inoperable. Hanafy also disputed Magnet Resources' damage claim. He defined overhead costs to include selling, administrative, advertising, travel and entertainment expenses, taxes, bad debts, commission and interest. He expressed the opinion that Magnet Resources should have allocated these overhead costs to servicing the Irvington and Paterson installations in proportion either to direct labor costs or to some other criterion, and that the allocated overhead should have been deducted from gross profits to calculate the amount of anticipated profits lost because of the cancellation of the servicing contract. On that basis, Hanafy concluded that Magnet Resources' lost profit was $38,171, rather than the $611,000 testified to by Veth.

Failure to ask the jury whose breach was material

It is black letter contract law that a material breach by either party to a bilateral contract excuses the other party from rendering any further contractual performance.[5] *Nolan v. Lee Ho*, 120 N.J. 465, 472,

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5 This statement of the black letter law is not intended to intimate any position on a materially breaching party's

577 A.2d 143 (1990); *Ross Systems v. Linden Dari-Delite, Inc.*, 35 N.J. 329, 341, 173 A.2d 258 (1961); *Duall Bldg. Restoration, Inc. v. 1143 East Jersey Avenue Assocs.*, 279 N.J. Super. 346, 364, 652 A.2d 1225 (App. Div.1995); *Restatement (Second) of Contracts* § 237 (1981). Neither Summit nor Magnet Resources asked the trial court to charge that proposition, and neither objected to the omission of that charge. Summit is therefore not entitled to a new trial because of this omission unless it constituted "plain error," *R.* 2:10-2, capable of producing an unjust result. *Gaido v. Weiser*, 227 N.J. Super. 175, 198, 545 A.2d 1350 (App. Div.1988); *Gluckauf v. Pine Lake Beach Club, Inc.*, 78 N.J. Super. 8, 26, 187 A.2d 357 (App. Div.1963); *Procanik v. Cillo*, 206 N.J. Super. 270, 292, 502 A.2d 94 (Law Div. 1985).

"Material breach" has been described as follows:

> Where a contract calls for a series of acts over a long term, a material breach may arise upon a single occurrence or consistent recurrences which tend to "defeat the purpose of the contract." [citation omitted] In applying the test of materiality to such contracts a court should evaluate "the ratio quantitatively which the breach bears to the contract as a whole, and secondly the degree of

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right to restitution or other similar equitable relief. See Restatement (Second) of Contracts § 374.

> probability or improbability that such a breach will be repeated." [citation omitted]
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> [*Medivox Productions, Inc. v. Hoffmann-La Roche, Inc.*, 107 N.J. Super. 47, 59, 256 A.2d 803 (Law Div. 1969).]

See Restatement (Second) of Contracts §§ 241 and 242. In the present case, there was evidence of three events or series of events which could arguably have constituted material breaches. In their order of occurrence, these were, first, Summit's continual late payments and, at the end, its failure to pay for either two or three months' service and for emergency service at Jersey City that was not covered by the contracts; second, Magnet Resources' failure and refusal to provide service for the Paterson installation beginning December 24, 1994; and third, Summit's cancellation of the service contracts the following week.

Whether conduct constitutes a breach of contract and, if it does, whether the breach is material are ordinarily jury questions. *Lo Re v. Tel-Air Communications, Inc.*, 200 N.J. Super. 59, 72-73, 490 A.2d 344 (App. Div. 1985); *De Ponte v. Mutual Contracting Co.*, 18 N.J. Super. 142, 146, 86 A.2d 785 (App. Div. 1952); *E.I Dupont De Nemours Powder Co. v. United Zinc & Chemical Co.*, 85 N.J.L. 416, 418, 89 A. 992 (Sup. Ct. 1914). However, the court's failure to pose those questions to the jury would have been prejudicial to Summit only if the jury could have found that Magnet Resources' refusal to provide service at the Paterson installation was a material

breach which justified Summit's canceling the contract.

Magnet Resources has argued to us that its refusal to provide service was not a material breach because Summit's non-compliance with its payment obligations was itself a prior material breach that excused it from any further duty of performance. *Cf. Zulla Steel, Inc. v. A & M Gregos, Inc.*, 174 N.J. Super. 124, 131-32, 415 A.2d 1183 (App. Div. 1980). Summit's non-compliance indisputably breached the contract. But Magnet Resources, by declaring a suspension and not a cancellation of its undertaking to service Summit's facilities, implied its willingness to resume service upon payment and, perhaps, upon adequate assurance of timely future payments. That statement of its implied readiness to continue the contract waived the materiality of the breach; that is, it precluded Magnet Resources from successfully relying on Summit's payment history to excuse its refusal to provide service. *See Garden State Bldgs. v. First Fidelity Bank*, 305 N.J. Super. 510, 525, 702 A.2d 1315 (App. Div. 1997), *certif. denied*, 153 N.J. 50, 707 A.2d 153 (1998); *Ballantyne House Assocs. v. City of Newark*, 269 N.J. Super. 322, 334, 635 A.2d 551 (1993).

Nonetheless, Magnet Resources had the legal right to do what it said it was doing, suspend its performance pending Summit's cure of its defaults within a reasonable time. Magnet Resources was a relatively small company. It did not contract to extend credit. Just the opposite. Its contract called for payment in advance. After repeatedly failing to make payments when they were due, Summit

promised to pay most of what it owed. When Summit failed to keep that promise, perhaps Magnet Resources would have been entitled to treat Summit's failure as a material breach. It did not do so. Instead, in order to avoid extending further credit which had not been bargained for, it withheld further performance of its contractual obligations until it had received either the payment that was due or reasonable assurances that payment would be promptly made. For the following reasons, we conclude that as a matter of law, this suspension of performance – refusing service at Paterson beginning December 24 – did not materially breach Magnet Resources' contractual obligations.

Section 251 of the *Restatement (Second) of Contracts* has been accepted as part of New Jersey law. *Lo Re, supra*, 200 N.J. Super. at 70-73, 490 A.2d 344. It has also been widely accepted in other jurisdictions. *Marvel Entertainment Group, Inc. v. ARP Films, Inc.*, 684 F.Supp. 818, 820- 21 (S.D.N.Y.1988); *United Corp. v. Reed, Wible & Brown, Inc.*, 626 F.Supp. 1255, 1257-58 (D.Vi. 1986); *Conference Ctr. Ltd. v. TRC–The Research Corp. of New England*, 189 Conn. 212, 455 A.2d 857, 863-64 (Conn. 1983); *Drinkwater v. Patten Realty Corp.*, 563 A.2d 772, 776 (Me. 1989); *Julian v. Montana State Univ.*, 229 Mont. 362, 747 P.2d 196, 199-200 (Mont. 1987); *Juarez v. Hamner*, 674 S.W.2d 856, 861 (Tex. App. 1984).

Section 251 states:

> (1) Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would

> of itself give the obligee a claim for damages for total breach under § 243, the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.
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> (2) The obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case.

The Comment to this section explains that an obligee of an executory promise "who believes, for whatever reason, that the obligor will not or cannot perform without a breach, is always free to act on that belief" by withholding his own performance. But if he cannot prove that his belief was correct, his non-performance may itself be a material breach of the contract, making him liable for damages. The Comment continues:

> This Section affords him an opportunity, in appropriate cases, to demand assurance of due performance and thereby avoid the uncertainties that would otherwise inhere in acting on his belief. If it is then reasonable for the obligee to suspend his own performance while he awaits assurance by the obligor, he may do so under Subsection

> (1).... If the obligee does not, within a reasonable time, obtain adequate assurance of due performance, he may under Subsection (2) treat the obligor's failure to provide such an assurance as a repudiation.

Significantly for the present case, Summit's failure to pay in accordance with its contract or with the promise by which it induced the provision of emergency service for the Jersey City facility did not have to amount to a material breach in order to have entitled Magnet Resources to demand assurances that Summit would comply with its obligations and to suspend performance for a reasonable time until those assurances were forthcoming. *Carfield & Sons, Inc. v. Cowling*, 616 P.2d 1008, 1010 (Colo. Ct. App. 1980), illustrates this proposition. The plaintiff, *Carfield*, as general contractor, agreed to erect a steel building for the owner, Schmoll. Carfield engaged a subcontractor, Krug, to pour the concrete foundation and floor. Before the concrete floor had fully cured, one of Krug's employees drove a gravel truck onto it. The owner demanded that the floor be replaced. The general contractor could detect no damage. He offered the owner a one-year written guarantee on all materials and workmanship for the floor, but refused to replace it. By various expedients the general contractor proposed to adopt, the building could have been completed on time and any necessary repairs could have been made. But the owner directed that no weight be put on the concrete floor for an additional seven days, demanded replacement of any damaged

concrete, and stopped a $15,000 check. The general contractor asserted that the owner was in breach, stopped work, removed the building, and sold it to mitigate damages. The concrete was not in fact damaged by the gravel truck. Subsequent tests showed that its bearing capacity exceeded the contract requirements. Remanding the case to determine whether the general contractor had offered adequate assurances of performance, the appellate court held:

> The breach of contract by Krug (and thus by Carfield) in not insuring that the driver of the gravel truck stayed off the concrete floor does not terminate Schmoll's obligations under the contract unless "that breach is a major breach going to the essential condition of the contract." [citation omitted] No such breach occurred in this case because the concrete was not damaged. However, we interpret the trial court's findings to mean that Schmoll reasonably believed that such a breach had occurred. Therefore, we conclude that in order to avoid liability under the contract, Schmoll was obligated to request adequate assurance of performance. If Carfield then refused to provide that assurance, Schmoll could treat the contract as terminated.
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> [*Ibid.*]

See also Julian, supra, 747 P.2d at 199.

Kunian v. Development Corp. of America, 165 Conn. 300, 334 A.2d 427 (Conn. 1973), illustrates the application of § 251 to facts closely analogous to those of the present case. Although *Kunian* was decided on the basis of § 2-609 of the Uniform Commercial Code, it is an appropriate guide to the decision of the present case because, according to the Comment to Restatement (Second) of Contracts § 251, that section is "a generalization, applicable without regard to the subject matter of the contract, from [the rule stated in] Uniform Commercial Code § 2-609."

The contract in *Kunian* provided for A. Merowitz and Company, Inc. to sell and deliver plumbing and heating supplies for a total cost of $358,381 to DCA Builders, a general contractor building a low cost housing project. The deliveries were to be made to the job site when and as ordered by the contractor. Materials delivered before the fifteenth of the month were to be paid for on the twenty-fifth; materials delivered between the fifteenth and thirtieth were to be paid for on the tenth day of the following month. The contract also provided that DCA Builders could take a two percent discount if it complied with these payment terms. From approximately March 18, 1969 to October 31, 1969, DCA Builders paid all amounts invoiced for materials received except for $7,502.75. A. Merowitz continued to deliver materials despite the indebtedness and, by November 26, 1969, the contractor owed approximately $38,000. On December 12, 1969, A. Merowitz met with DCA Builders and insisted on full payment, but received only $5,000. However, DCA Builders promised to make payments during January 1970 to reduce its

debt, provided that A. Merowitz continue to deliver materials as ordered. The seller complied, but the contractor did not make any further payments either to reduce its indebtedness or for the new deliveries. In early January 1970, DCA Builders began purchasing plumbing and heating supplies from another source; however, on January 14, 1970, it wrote A. Merowitz demanding delivery of the balance of the supplies due under its contract. DCA Builders had not performed its previous promise to make payments on what it already owed. In response to DCA Builder's January 14 letter, A. Merowitz stated that it would deliver the balance of the required materials but, in view of the large indebtedness outstanding, only if DCA Builders deposited sufficient cash in escrow to pay for the delivered materials. When DCA Builders refused to comply by January 27, 1970, A. Merowitz ceased making deliveries. DCA Builders then owed A. Merowitz approximately $51,000; materials previously delivered totaled approximately $200,000.

Rejecting DCA Builders' contention that A. Merowitz had breached the contract by refusing further deliveries without a guarantee of payment, the Court said:

> [DCA Builders] argues that [A. Merowitz] should have continued making deliveries and its failure to do so after January 27, 1970, was a breach of contract. It is undisputed, however, that at the December 12, 1969, meeting between the parties [A. Merowitz] demanded adequate assurance that [DCA Builders] would pay its

> outstanding indebtedness before [A. Merowitz] would continue making deliveries. Under the circumstances, this was equivalent to a written demand for adequate assurance. It is further undisputed that [DCA Builders] failed to abide by its promise made at the conference to pay its outstanding indebtedness or even to pay for the subsequent deliveries which it thus had induced [A. Merowitz] to make. [A. Merowitz] then had 'reasonable grounds for insecurity' and justifiably informed [DCA Builders] that it would deliver the balance of the material only if payment of the entire contract was guaranteed by [DCA Builders'] depositing sufficient cash in escrow to pay for the delivered materials. [DCA Builders'] failure, therefore, to provide adequate assurance of due performance within a reasonable time after the request and after the action had been brought was a repudiation of the contract and [A. Merowitz] was excused from further performance under the contract.
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> [*Id.* at 312-13, 334 A.2d 427.]

These legal principles reflected in *Restatement (Second) of Contracts* § 251 and illustrated by the cited cases lead us to the conclusion that Magnet Resources was entitled to condition service after December 24, 1994 on payment or an acceptable

arrangement for payment of the amount which Summit owed in accordance with its contract. In our view, a properly instructed jury could not reasonably have found otherwise. Consequently, we hold that, as a matter of law, Magnet Resources' suspension of performance was not a breach and, therefore, not a material breach. Summit's repudiation of the contract by arranging to have another firm service its MRI installations was consequently the first material breach, making it liable to Magnet Resources for lost profits. Because, as a matter of law, Magnet Resources' withholding service beginning December 24 was not a material breach, Summit was not prejudiced by the trial court's failure to instruct the jury that one party's material breach avoids liability by the other party for subsequent non- performance. That omission therefore entitles Summit neither to reversal of the judgment and a new trial nor to a judgment notwithstanding the verdict.

We agree with Summit, however, that the jury's verdict awarding it $18,470 is inconsistent with the verdict awarding Magnet Resources $492,320. But we disagree with Summit about the consequence of this inconsistency. The only basis Summit offered for its claim of damages was Magnet Resources' refusal to provide emergency service for the Paterson installation on and after December 24, 1994. Since Magnet Resources was legally justified in withholding service, its doing so did not constitute a breach and does not make Magnet Resources liable for losses which Summit may have sustained as a consequence. There is therefore no legal basis for the verdict in favor of Summit on its counterclaim.

Treatment of overhead in the calculation of lost profits.

In the absence of a contrary agreement, an injured party with the legal right to be compensated for the breach of a contract is entitled to the amount of damages (assuming they were reasonably in the contemplation of the parties) which, excluding attorneys' fees and court costs[6] for prosecuting the breach of contract action itself, will put that party in the same position it would have been in if the breaching party had performed the contract in accordance with its terms, no better position and no worse. *In re Liquidation of Integrity Ins. Co.*, 147 N.J. 128, 135-36, 685 A.2d 1286 (1996); *Donovan v. Bachstadt*, 91 N.J. 434, 444, 453 A.2d 160 (1982); *525 Main St. Corp. v. Eagle Roofing Co.*, 34 N.J. 251, 254, 168 A.2d 33 (1961); 5 *Corbin on Contracts* § 992 (1964); 11 *Williston on Contracts* § 1338 (Jaeger ed., 3d ed. 1968). One corollary of that rule is that if the party injured by a breach has lost profits which were reasonably anticipated to accrue from the contract, that party is entitled to recover those lost profits. *Stanley Co. of America v. Hercules Powder Co.*, 16 N.J. 295, 314, 108 A.2d 616 (1954); *Pickett v. Lloyds*, 252 N.J.Super. 477, 491, 600 A.2d 148 (1991); *Perth*

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6 Of course, contracts frequently provide that a party injured by a breach can recover attorney's fees and court costs as part of its damages. Such a provision is generally enforceable. *See Community Realty Management, Inc. v. Harris*, 155 N.J. 212, 233-34, 714 A.2d 282 (1998); *Cohen v. Fair Lawn Dairies, Inc.*, 86 N.J. Super. 206, 213-14, 206 A.2d 585 (App. Div. 1965).

Amboy Iron Works, Inc. v. American Home Assurance Co., 226 N.J. Super. 200, 224, 543 A.2d 1020 (App. Div. 1988), *aff'd o.b.*, 118 N.J. 249, 571 A.2d 294 (1990). A second corollary is that the injured party should not recover expenditures which will be "saved" because it has been excused from further performance by the other party's breach. *In re Community Medical Center*, 623 F.2d 864, 866 (3d Cir. 1980); *Argentinis v. Gould*, 219 Conn. 151, 592 A.2d 378, 381 (Conn. 1991); *Magnolia Metal Co. v. Gale*, 189 Mass. 124, 75 N.E. 219, 220 (Mass.1905); Corbin, *supra*, at § 1038; *Restatement (Second) of Contracts* § 347.

"Saved" costs obviously include those which the non-breaching party would otherwise have had to expend and which are avoided because it has been excused from performance by the other party's breach. For example, the cost of any supplies, not separately reimbursable under the terms of Magnet Resources' contract, which it would have had to purchase to service Summit's MRIs and which it did not have to purchase because of the cancellation is an example of one such "saving" that would have to be deducted from gross revenue to calculate damages measured by lost profits. *See e.g., ACS Home Systems, Inc. v. Diggins*, CIV.A. No. 87-5650, 1988 WL 36353, at *2 (E.D.Pa. April 19, 1988); *Restatement (Second) of Contracts* § 347, comment d, illustration 6. Suppose, however, that there are materials of a type needed by several of Magnet Resources' customers which it purchased for performance of its contract with Summit. If cancellation of the contract enabled Magnet Resources to use those materials for other

customers, thus relieving it of the necessity of making additional purchases for the other customers, the cost of those materials, although expended, has been "saved" and must be deducted to calculate lost profits. *See Chicago v. Greer*, 76 U.S. (9 Wall.) 726, 732, 19 L. Ed. 769, 770 (1870); *Lieberman v. Templar Motor Co.*, 236 N.Y. 139, 140 N.E. 222, 225 (N.Y. 1923); *cf. Feldman v. Jacob Branfman & Son, Inc.*, 111 N.J.L. 37, 42, 166 A. 126 (E. & A.1933);

Administrative expenses and plant overhead have to be viewed the same way. These costs, to the extent reasonably allocable to a contract, are deductible from gross revenue to determine lost profits for breach of the contract only if they are costs which have been "saved" because the non-breaching party has been excused from future performance under the contract. Allocable administrative and overhead costs which do not diminish because of the contract cancellation should be considered "saved" only if the services, facilities and materials for which they continue to be incurred are devoted to some other employment which could not have been undertaken if the contract had not been canceled. *Cf. N.J.S.A.* 12A:2-708(2); U.C.C. § 2- 708(2) (providing that in the event of a buyer's breach of contract one measure of damages which may be available to the seller is the amount of his lost profits, "including reasonable overhead"); S.R. Shapiro, Annotation, Comment Note: *Overhead Expense as Recoverable Element of Damages*, 3

A.L.R.3d 689, 695 (1965); 22 Am.Jur.2d *Damages* § 645 (1988).[7]

Summit's accountant, Hanafy, testified that unallocated indirect costs and overhead expenses, consisting of such items as rent, secretarial salaries, and officers' salaries, should also have been allocated to the performance of the contract. However, he based this testimony on principles of "managerial accounting," not on proof that any of those costs were "saved." Evidence was presented at trial from which the jury could reasonably have inferred that Magnet Resources (unlike a manufacturing concern, the capacity of whose machines might impose a relatively inflexible limit on its business) could probably service a smaller or larger number of MRI installations with the same administrative and plant overhead because

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7 "Some cases take the position that indirect costs – such as rent, salary of office employees, salary of administrative personnel, utilities, and other 'overhead' items –are a part of the cost of production, and deduct them from the contract price to determine the net profit which may be recovered. [citations omitted] To the extent that the breach of contract allows the plaintiff an opportunity to enter into other contracts which now bear the same portion of the indirect costs as were to be borne by the breached contract, these cases are simply an expression of the doctrine of avoidable consequences. [citation omitted] But the proper application of the doctrine of avoidable consequences leads to the conclusion that the plaintiff is entitled to recover, as part of an award of profits, fixed indirect costs (those that could not be reduced by defendant's breach), but not variable indirect costs (those that could be avoided after the breach)." [22 Am.Jur.2d *Damages* § 645, at 707 (1988) (emphasis added).]

the servicing was done primarily by technicians who worked at the customers' sites. Magnet Resources' accountant, Veth, testified that the only costs which were avoided by the cancellation of the Summit contract were direct labor, including supervisory labor, fringe benefits, material and transportation expenses. In the light of the nature of the company's business, the jury was certainly free to accept Veth's testimony as true in whole or in part.

Both parties have argued the significance of *Apex Metal Stamping Co. v. Alexander & Sawyer, Inc.*, 48 N.J. Super. 476, 486, 138 A.2d 568 (App. Div. 1958), which holds that the party seeking to recover lost profits has the burden of proving that its overhead costs, particularly the compensation paid to its managing partners, are not "saved" and therefore not deductible from its gross profits to calculate damages. Summit contends that Apex Metal establishes that Magnet Resources has not sustained its burden of proof on the deductibility of overhead and administrative costs. Magnet Resources argues that the Apex Metal rule is applicable only to a manufacturing contract and not to a contract for services. We conclude that the rule is applicable without regard to whether the particular contract deals with manufacturing, sales, or services. The enterprise which has incurred the relevant costs is in the best position to adduce the proof which will establish whether those costs are properly deductible from profits under the rule discussed here. However, we are also of the view that the evidence presented in this case was adequate to support Magnet Resources' burden of proof.

We also hold that, in the absence of any request to charge with respect to the burden of proving the deductibility of overhead and administrative expenses, the trial court's jury instructions on that issue do not constitute plain error requiring reversal of the judgment. The jury's attention was directed to the conflicting testimony of the parties' accountants and, in the context of that reference, it was instructed that "it is the plaintiff's burden to prove to you by a preponderance of the evidence that the overhead expenses should not be considered." After having recently heard the accountants explain why overhead and administrative expenses should or should not be deducted, the jury would have understood the instruction as asking them to determine the extent, if any, to which those expenses had been avoided because of the contract cancellation. Although a more detailed and explicit instruction would have been desirable and should have been requested by the attorneys, the charge that was given was not so inadequate as to require reversal of the judgment.

Miscellaneous Arguments

We also reject Summit's contention that the court's instruction on mitigation of damages was prejudicially erroneous. Again, neither party objected to the charge or requested a specific instruction on the issue. Furthermore, the burden of proving Magnet Resources' failure to mitigate rested on Summit. *Sommer v. Kridel*, 74 N.J. 446, 457, 378 A.2d 767 (1977); *Ingraham v. Trowbridge Builders*, 297 N.J. Super. 72, 83, 687 A.2d 785 (App. Div. 1997). Summit offered no evidence to support that burden. Any error in the court's instructions on mitigation is

therefore immaterial. Whether to permit Magnet Resources to reopen its case to present additional accounting testimony and whether to allow its accountant to testify to something that was not explicitly stated in his report were within the discretion of the trial court. *State v. Loftin*, 146 N.J. 295, 363, 680 A.2d 677 (1996); *Italian Fisherman, Inc. v. Commercial Union Assurance Co.*, 215 N.J. Super. 278, 285-86, 521 A.2d 912 (App. Div.), *certif. denied*, 107 N.J. 152, 526 A.2d 211 (1987). That discretion was not abused. Summit offered no proof that any of the conditions which could have resulted in termination of the contract before its scheduled termination date was likely to occur. In the absence of such proof, Summit's argument that the jury should have been instructed to consider possible early termination is without merit.

With respect to Magnet Resources' cross-appeal, we conclude that it has not pointed to anything in the record that was presented to the summary judgment court to show that there was a genuine issue of fact which, if decided in its favor, would entitle it to a judgment against the individual defendants. There is therefore no basis for our holding that the grant of summary judgment was error. *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520, 523, 666 A.2d 146 (1995).

Magnet Resources' final point is that "the verdict was erroneous because, as a matter of law, plaintiff's damages should not be reduced by the amount of its overhead." The argument is entirely without merit. *R.* 2:11-3(e)(1)(E). We have held that Magnet Resources presented sufficient evidence to satisfy its burden of

proving that its overhead costs should not be deducted from the contract revenues to determine lost profits. But there is no basis for holding that the jury was required to find that Magnet Resources proved by a preponderance of the evidence that none of its overhead and administrative expenses were avoided because of the breach.

The judgment in favor of Magnet Resources is affirmed. The judgment in favor of Summit is vacated and the case is remanded to the Law Division for the entry of a judgment of no cause for action on Summit's counterclaim.